90-1478

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

FRANK L. NACCARATO,

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an individual working for a local organization which has an existence separate and apart from federal funding and the individual has no authority to enter into contracts on the part of the federal government or the local organization may be classified as a "public official" pursuant to 18 U.S.C. 201?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner: Frank L. Naccarato

Respondent: United States of America

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I. OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Naccarato* is attached as Appendix "A."

II. JURISDICTION

The Honorable Andrew J. Kleinfeld, Judge for the United States District Court for the District of Alaska, denied petitioner's motion to dismiss the criminal charges because the alleged receiver of a bribe was not a public official under 18 U.S.C. 201(a)(1). The opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court's ruling was entered on December 18, 1990.

Jurisdiction is conferred on the United States Supreme Court to review this case by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

A. 18 U.S.C. § 201

B. AS 18.55.995 *et seq.*

C. AS 18.55.996 *et seq.*

IV. STATEMENT OF THE CASE

Petitioner herein, FRANK NACCARATO, was charged with conspiracy to bribe to which he pleaded not guilty. The allegations involved a lease that was entered into between the Tlingit-Haida Regional Housing Authority in Alaska and a group of individuals, including Frank Naccarato. The Housing Authority was represented by an individual named Felipe Tagaban during the time of the relationship described herein. After a jury trial, Mr. Naccarato was convicted of a single count of conspiracy to bribe a public official.

The first payment to Mr. Tagaban was made in March of 1984 after the lease had been signed in October of the preceding year. RP 3, p.188: 2-19. Prior to this there was no discussion about paying Tagaban any money. RP 3, p.126: 10-12. *See also*, RP 3, p.133: 3-8; RP 3, p.144: 4-11. Indeed, there was never any discussion that money was to be given to Tagaban for the purpose of influencing him. RP 3, p.182: 5-7.

Prior to entering into the lease, Tagaban had called Michael Orsborn in May 1983 and told him that Tlingit-Haida needed a warehouse because the Authority was expanding and asked if Orsborn could find them a warehouse. RP 4, p.165: 15-24. Tagaban told Orsborn that this would be needed for a five year program. RP 4, p.166: 19-25.

After meeting Tagaban, Orsborn ran into Frank Naccarato and discussed the situation about arranging a warehouse and when he was told there could be a finder's fee involved, Orsborn requested $25,000, which was agreed to. RP 4, p.171: 3-15. Subsequently, Orsborn

went back to Tagaban and discussed with him Naccarato's plans for hopefully getting a space for this particular project. *Id.*, at 18-24. He then acted as a go-between between Tagaban and Naccarato, conveying the details that were needed by both. RP 4, p.172: 3-10. Some time during this time period Orsborn told Tagaban about his finder's fees and Tagaban expressed some shock and asked, what am I going to get out of this. *Id.*, at 11-24. Orsborn did not mention anything to Naccarato or Brinkman about Tagaban's statement wanting money. RP 4, p.173: 19-24. Orsborn never reached any agreement with Naccarato about any money Tagaban would get. RP 4, p.175: 20-25. Nor was there any discussion between Tagaban and Naccarato at the meeting that Orsborn was present where money was discussed. RP 4, p.176: 3-11.

The money that was made available to the Housing Authority for the purpose of this lease came from what is known as the Comprehensive Improvement Assistance Program (CIAP). This program authorized HUD to provide financial assistance to public housing authorities to improve housing quality and make it available to low income families. RP 2, p.43: 9-18.

Felipe Tagaban was employed with the Regional Housing Authority between May of 1983 and March of 1985 as an administrative officer. During that time he acknowledged that he was paid on two occasions; in March of 1984 and September of 1984. RP 4, p.56: 19 – p.57: 6.

Tagaban was originally introduced to Mr. Naccarato through Michael Orsborn. RP 4, p.56: 17. Orsborn was a person that Tagaban knew since September of 1982 and

had met through the Juneau Parks Recreational Program. RP 4, p.57: 22-23. During his negotiations with Orsborn, Tagaban was told that Orsborn was to receive a $25,000 finder's fee and that he would share it with Tagaban. RP 4, p.60: 22 – p.61: 6. Even though Orsborn had told him he would give him $10,000, Tagaban never thought he would receive $10,000, but signed the lease because it was needed anyway. RP 4, p.131: 5-23. He had not met Naccarato during this time period; nor did he have any discussions with him. RP 4, p.61: 10.

Later, Tagaban received a call from Frank Naccarato regarding signing the lease on approximately October 18, 1983. RP 4, p.63: 5-14. Despite telling Naccarato and Orsborn that he had the authority to sign the lease, he actually had none. RP 4, p.98: 17. After Tagaban received a call, he went to Ken Eldridge's attorneys' office and signed a lease in the presence of the attorneys, Frank Naccarato and Eldridge. RP 4, p.63: 15-25.

After entering into the lease, Tagaban again had several discussions with Mr. Orsborn. RP 4, p.79: 25 – p.80: 4. During one of these conversations, Orsborn told Tagaban that he had received his finder's fee in the amount of $10,000 from Frank Naccarato. Orsborn told Tagaban that if he wanted anything he would have to contact Mr. Naccarato. RP 4, p.80: 5-12.

Tagaban then contacted Naccarato after the lease was signed. RP 4, p.132: 2-10. Tagaban had no knowledge of any arrangements between Naccarato and Orsborn. *Id.*, lines 20-25. Orsborn also acknowledged that it wasn't until after the lease was signed that he went to Naccarato saying that Tagaban wanted money. RP 4, p.199: 8-25.

Tagaban's lack of authority to originally enter into the lease was corroborated by others. Frank Koulick, who was the manager of the HUD office in Anchorage, Alaska between August, 1984 and February of 1989, testified that although Felipe Tagaban signed the lease and numerous contracts between the Housing Authority and Frank Naccarato and the other individuals, he really couldn't attest to whether Mr. Tagaban did it under the color of any authority that he may have had. RP 2-76: 8-22. However, Tagaban's supervisor, Joseph Wilson, testified that any lease was invalid because "Mr. Tagaban did not have the authority to enter into such a document . . . " RP 2, p.148: 14-17. Moreover, from January though March of 1985 Mr. Tagaban was not entitled to contract a crew to go out to the specific villages involved in the program. RP 2, p.177: 7-16.

Joseph Wilson, was the executive director of the Housing Authority between March, 1983 and January 20, 1989, and was responsible for the supervision of Felipe Tagaban. Mr. Tagaban's responsibilities included assisting in putting together a management improvement plan regarding the relationship between the Housing Authority and HUD. RP 2, p.126-127. Mr. Tagaban's title was Administrative Manager. RP 2, p.127: 12-14. After conviction, Naccarato was sentenced to eighteen months in prison and ordered by pay $50,000 in restitution. The Ninth Circuit affirmed his conviction and he now seeks a Writ of Certiorari.

V. REASONS FOR GRANTING PETITION

A. THIS COURT SHOULD GRANT THE PETITION FOR REVIEW BECAUSE THE NINTH CIRCUIT HAS SO GREATLY EXPANDED THE HOLDING OF *DIXSON V. UNITED STATES* THAT THE DEFINITION OF PUBLIC OFFICIAL UNDER 18 U.S.C. 201(a)(1) HAS BECOME MEANINGLESS AND THE DECISION IS IN CONFLICT WITH DECISIONS FROM OTHER JURISDICTIONS.

18 U.S.C. 201 defines public official as:

> [M]ember of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency or branch of Government or a juror . . .

In the instant case, whether a person may be identified as a public official under the above definition depends on the relationship between Felipe Tagaban and the agency for whom he worked and the Federal Government. *Dixson v. United States*, 465 U.S. 482, 486, 104 S.Ct. 1172, 1175, 79 L.Ed.2d 458 (1984).

Importantly, the mere presence of federal assistance does not in or of itself bring a local organization and its employees within the jurisdiction of the federal bribery statute. 465 U.S. 482, 499, 104 S.Ct. 1172, 1181. Nor are all local employees who are responsible for administering a federal grant program pulic officials within the meaning of § 201(a). *Id.* In holding that petitioners were federal officials in *Dixson*, this Court recognized the following

attributes which established the required nexus: (1) the Federal Government allocated two federal block grants from HUD to Peoria, Illinois; (2) the local organization for which petitioners worked, United Neighborhoods, Inc. (UNI), was subsequently organized with the sole purpose of administering federal block grants; (3) petitioners were hired to head UNI; (4) petitioners' salaries were completely funded by the federal grant; and (5) petitioners personally bestowed the benefits of HCDA program to the residents of Peoria, Illinois. 465 U.S. at 485-492, 104 S.Ct. at 1173-80.

In contrast, the Tlingit-Haida Central Council, the local organization at issue here, maintains an existence apart from that of federal funds. Initially, the purpose of the legislation which allowed the formation of the council is to "provide a means for certain native associations to form public corporations with the powers and duties comparable to the Alaska State Housing Authority." AS 18.55.995. *See*, Appendix "B." Additionally, in contrast to the organization in *Dixson*, the authority was granted the power to enter into agreements with numerous political subdivisions.[1] AS 18.55.996(b). Tlingit-Haida's existence did not depend on federal funding.

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[1] AS 18.55.996(b) provides as follows:

> (b) There is created with respect to each of the associations named in (a) of this section a public body corporate and politic to function in the operating area of the individual associations to be known as the regional housing authority of the associations possessing all powers, rights and functions now or

(Continued on following page)

Moreover, Felipe Tagaban, the alleged public official in this case, did not even have the authority to enter into contracts on behalf of Tlingit-Haida Authority – a fact noted by the Ninth Circuit in its opinion. Moreover, unlike in *Dixson*, there is nothing to suggest that Mr. Tagaban received his salary in whole or in part from federal funds.

In these respects, Tagaban's position was similar to those individuals in *United States v. Del Toro*, 513 F.2d 656 (1974) and *United States v. Loshiavo*, 531 F.2d 659 (1976). In *Del Toro*, the court in holding that the individuals were

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subsequently specified for the Alaska State Housing Authority, under the Alaska State Housing Authority Act (AS 18.55.010 – 18.55.290) except those specified with respect to the construction and acquisition of public buildings for lease to the state or any subsequently specified authority that is inconsistent with AS 18.55.995. The authority may enter into agreements with local government, other political subdivisions of the state, the state or the federal government for the exercise of a function or power relating to construction, operation and maintenance of public facilities or public utilities. Upon execution of an agreement and for the period of the agreement the authority shall have the same powers and functions relating to the subject matter of the agreement as those that may legally be exercised by the governmental unit with whom the agreement is made including the authority to separately or together with the other unit borrow money and issue notes, bonds or other evidence of indebtedness to finance a project within the scope of the agreement subject to the express limitations, if any, contained in the agreement. All obligations or liabilities of the regional housing authority shall remain their own and are not obligations or liabilities of the state.

not public officials noted that the "public official" was "a city employee, carrying out a task delegated to him by his superior, another city employee." 513 F.2d at 662. This is precisely the case here. Under these circumstances the Second Circuit held that it was reversible error to permit the jury to determine that the employer was a federal public official under the phrase, "acting for or on behalf of the United States in any official function." *Id.* at 662-63.

Likewise, it was error to allow a jury to determine if Felipe Tagaban was a public official in this case. The existence of Tlinget-Haida was not dependent on federal funding as was the case in *Dixson*. Tagaban's salary was not dependent on these funds. Tagaban had no authority to enter into contracts on the part of the Federal Government. Moreover, Tlingit-Haida was established with powers granted by the State.

In sum, the decision by the Ninth Circuit, which ignores the lack of connections between Felipe Tagaban and Tlingit-Haida to the Federal Government, extends the definition of "public official" beyond any reasonable interpretation. Apparently, any time the Federal Government contributes as little as a dollar to a state or local agency, any employee of that agency is to be considered a public official. This strained interpretation is unwarranted and extends the definition of "public official" beyond all reason. Moreover, the decision is in conflict with decisions from other jurisdictions. Thus, this Court should accept review.

VI. CONCLUSION

Based on the foregoing points and authorities, as well as the files and records herein, the United States Supreme Court should issue a writ of certiorari to the Ninth Circuit Court of Appeals and accept review of this case.

Respectfully submitted,

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APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. FRANK NACCARATO, Defendant – Appellant.	No. 89-30377 DC# A89-015 Criminal MEMORANDUM* (Filed Dec 18 1990)

Appeal from the United States District Court
for the District of Alaska

Andrew J. Kleinfeld, District Judge Presiding
Argued and Submitted October 3, 1990
Seattle, Washington

Before: Hug, D.W. Nelson, Circuit Judges, and Carroll** District Judge.

A jury found Frank Naccarato guilty of conspiracy to bribe a public official in violation of 18 U.S.C. §§ 201(b), 371-372 as charged in Count III of the indictment. Naccarato was sentenced to a term of 18 months imprisonment and ordered to pay restitution in the amount of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Hon. Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

$50,000 to Tlingit-Haida Regional Housing Authority (Tlingit).

Standard of Review

A district court's decision involving mixed questions of law and fact is reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1204 (9th Cir.) *cert. denied* 469 U.S. 824 (1984).

The standard for reviewing a challenge to the sufficiency of the evidence supporting a jury verdict is whether there is substantial evidence to support the conviction. *United States v. Douglas*, 780 F.2d 1472, 1476 (9th Cir. 1986).

Sentences imposed within statutory limits are reviewed for abuse of discretion. *United States v. Angelica*, 859 F.2d 1390, 1392 (9th Cir. 1988); *United States v. Endicott*, 803 F.2d 506, 510 (9th Cir. 1986).

Facts

The United States Department of Housing and Urban Development (HUD) pursuant to the Comprehensive Improvement Assistance Program (CIAP), 42 U.S.C. § 14371, disbursed approximately $3,500,000 to Tlingit, in order to promote renovation of low income housing in Juneau, Alaska.

Felipe Tagaban was the administrative officer of Tlingit and coordinator of the housing authorities' participation in CIAP. Tagaban had authority to hire and fire employees, negotiate contracts and commit certain funds

of Tlingit, subject to approval of Joe Wilson, the executive director of Tlingit.

HUD approval was required prior to any expenditure of funds pursuant to CIAP.

It was determined by Tagaban that Tlingit would need a warehouse for supplies, equipment and fixtures of the rehabilitation project. Michael Orsborn, an acquaintance of Tagaban, agreed to help find a warehouse for Tlingit.

In the summer of 1983, Orsborn met with appellant, Frank Naccarato, a contractor. Orsborn and Naccarato discussed the needs of Tlingit and the possibility of Orsborn receiving a finder's fee if he found a tenant for the warehouse to be built for Tlingit by Naccarato.

In preparation for construction of the warehouse Naccarato solicited Myron Brinkman to provide initial financing. Property owned by Ken Eldridge was selected as the site for construction.

Naccarato, Brinkman and Eldridge formed the Lemon Glacier Development Company (Lemon Glacier), a partnership. The partnership agreed to pay Orsborn $25,000 if he obtained a reliable tenant for the warehouse.

Tagaban was told by Orsborn that he would receive $10,000 dollars if he signed a lease, on behalf of Tlingit, to occupy the Lemon Glacier warehouse.[1] Tagaban signed a warehouse lease, purportedly on behalf of Tlingit, with the Lemon Glacier partnership on October 18, 1983. The

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[1] Tagaban did not have authority to sign a lease on behalf of Tlingit.

lease was for a five year term at a rate of $1.25 per square foot.[2] Tagaban also signed other contracts for repair work with Naccarato on behalf of Tlingit.[3]

Naccarato, Brinkman and Eldridge also controlled a company called "Heavier Than Air" which was paid over $700,000 dollars for repair and renovation work, on low income housing, performed for Tlingit.

Tagaban was paid $10,000 dollars in March 1984 by Naccarato and Brinkman. Tagaban received another $10,000 from Brinkman on behalf of Naccarato, Brinkman and Eldridge in September 1984.

In March 1989 an indictment was returned charging Tagaban with bribery, tax violations and converting federal property to his own use. The indictment also charged Naccarato and other codefendants with conspiracy to bribe a public official (Tagaban).

Tagaban, Brinkman and Orsborn pled guilty and agreed to testify against Naccarato as a part of their plea agreements.

Discussion

Tagaban was a "Public Official"

Appellant asserts that the trial court erred in determining that Tagaban was a public official within the

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[2] An appraisal of the warehouse determined that the fair market rental value of the warehouse was $.65 per square foot.

[3] Tagaban executed nine back dated emergency repair contracts, for approximately $500,000 in repair work, with Naccarato, on behalf of Tlingit, after he had been relieved of his authority by Tlingit.

meaning of 18 U.S.C. § 201(a)(1) relying principally on *United States v. Del Toro,* 513 F.2d 656, 662 (2d Cir.) *cert denied* 423 U.S. 826 (1975) and *United States v. Loschiavo,* 531 F.2d 659, 661 (2d Cir. 1976).

The term "public official" as defined by § 201, means:

> [A]n officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government,. . . .

28 U.S.C. § 201(a).

The determination of whether Tagaban was a "public official" turns on the relationship between him and the Federal Government. *Dixson v. United States,* 465 U.S. 482, 486 (1984).

Funds were provided to Tlingit pursuant to the United States Housing Act of 1937, (as amended) 42 U.S.C. § 1437 *et seq.* The policy behind the Housing Act is to:

> promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of . . . dwellings for families of low income and . . . vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs.

42 U.S.C. § 1437.

Tlingit received funds from HUD pursuant to CIAP which is a special program under the amended United States Housing Act of 1937. CIAP, as is the entire Housing Act, is regulated by numerous federal implementing regulations. By administering HUD funds, Tlingit subjected itself to federal constraints and restrictions. Tlingit was in a situation very similar to that of United Neighborhoods, Inc. in *Dixson*.

The bribery statute is a comprehensive statute applicable to all persons performing activities for or on behalf of the United States. *Dixson*, 465 U.S. at 496 (1984). The issue here is whether Tagaban occupied a position of public trust with official federal responsibilities. *Id*. Tagaban must have had some degree of official responsibility for carrying out a federal program or policy. *Id*.

Tagaban was the coordinator of the Tlingit's participation in the CIAP. As the coordinator of Tlingit's involvement with CIAP he had authority to negotiate contracts, and expend Federal Government funds. Although Tagaban was not the ultimate authority in Tlingit, he had a substantial role in the housing authority's implementation of CIAP. The issue here is whether Tagaban was required to abide by regulations governing the implementation of the Housing Act and CIAP. Tagaban's role in Tlingit is not distinguishable from the role of petitioners in *Dixson*. He was in a position of responsibility, acting on behalf of the Federal Government in administering expenditures of federal funds and implementing federal policy. Tagaban had the apparent authority to sign the lease, and he also had the authorization to use his superior's signature plate on the checks. It is clear

that he did not have the authority to disburse the funds and sign the documents.

Accordingly, the district court did not commit error in denying appellant's motion to dismiss.

Evidence Sufficient for Jury to Convict Appellant

Appellant contends that his conviction should be reversed because insufficient evidence was presented upon which to find guilt beyond a reasonable doubt.

Reviewing the sufficiency of the evidence requires assessment of whether the evidence adduced at the trial could support any rational determination of guilt beyond a reasonable doubt. *United States v. Powell*, 469 U.S. 57 (1984).

Appellant was found guilty of violating 18 U.S.C. § 201(b) which, in pertinent part, is aimed at:

> Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with the intent –
>
> (1) to influence any official act; or
> (2) to influence such public official . . . to commit . . . any fraud . . . on the United States; or
> (3) to induce such public official . . . to do or omit to do any act in violation of his lawful duty. . . .

There was sufficient evidence presented at trial to support the jury's verdict of guilty.

Brinkman testified that Naccarato, Brinkman and Eldridge paid Tagaban to obtain business, for doing business and for favors. On direct examination Brinkman

stated that Naccarato told him "You didn't see me give him no money?" after Naccarato had given Tagaban $10,000 in cash.

Tagaban, substantiated Brinkman's testimony by stating he was paid $20,000 for favors. Tagaban also testified that Naccarato handed him an envelope containing $10,000 cash.

The testimony also showed that Naccarato devised a scheme to disguise a payment to Tagaban as a loan. Naccarato drafted a letter to be signed by Brinkman demanding repayment of a $10,000 "loan". The letter was delivered by appellant to Tagaban. Tagaban was told to respond to the demand so as to "cover" the $10,000 payment to Tagaban.

There was also substantial circumstantial evidence presented at trial which a rational jury could rely on in determining Naccarato's guilt, ie. cash payments to Tagaban, inflated warehouse rental rate, the issuance of 9 emergency repair contracts drafted by Naccarato, etc.

Viewed in light most favorable to the Government the evidence adduced at trial supports the jury's determination of guilt beyond a reasonable doubt.

Lawful Sentence Imposed by District Court

Naccarato argues that his eighteen month sentence should be modified so as to be consistent with the sentences received by the other defendants.

Sentences within statutory limits are generally not subject to review. *Endicott*, 803 F.2d at 510. Disparate sentences for codefendants will be upheld when the

record shows differences in the defendant's behavior. *Cocio v. Bramlett*, 872 F.2d 889, 894 (9th Cir. 1989).

Brinkman and Orsborn were sentenced to 30 days incarceration to be served on weekends and Tagaban was given a 13 month sentence.

Despite, appellant's assertion to the contrary, the convicted codefendants were not found to be equally culpable.

The district court stated at sentencing that Naccarato was the dominant leader of the enterprise. The court found that Orsborn was a mere go-between and Brinkman was a "sucker".

The sentence imposed upon appellant is within the statutory limits of 18 U.S.C. § 371 and there is adequate justification on the record to support the disparities in sentences.

Lesser Included Instruction not Required

Appellant's position is that his conviction should be reversed because the District Court refused to give a lesser included instruction of illegally giving a gratuity.

As appellees point out, the appellant failed to object to the court's failure to instruct the jury on 18 U.S.C. § 201(f). A party may not assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider the verdict. Fed. R. Crim. P. 30. Where there are no objections or requests by defense counsel, a trial court's decision on jury instructions will be reversed only if the omission of an instruction constituted plain error. *United States v. Kaplan*,

895 F.2d 618, 623 (9th Cir. 1990). If an appellant does not raise an objection at trial, an omission of a requested instruction must amount to a grave miscarriage of justice so as to constitute plain error. *Id.* The district court did not commit plain error in this instance.

Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Fed.R.Crim.P. 31(c). *United States v. Lopez*, 885 F.2d 1428, 1436 (9th Cir. 1989) "citing *Schmuck v. United States*, ___ U.S. ___, 109 S.Ct. 1443, 1450 (1989)". Naccarato was entitled to a lesser included offense instruction only if he could establish (1) that the elements of the alleged lesser offense constitute a subset of the elements of the crime charged, and (2) that, given the evidence adduced at trial, a rational jury could find him guilty of the lesser offense and still acquit on the greater. *Lopez*, 885 F.2d at 1436-1437 (1989).

The district court ruled that § 201(f) is not a lesser included offense of conspiracy to bribe a public official. The district court's rational was that the offense of giving a gratuity to a public official requires proof that the defendant actually gave something of value to a public official which is not an element of conspiracy to bribe a public official. The analysis of the lower court is correct.

Restitution

Appellant contends that the district court abused its discretion by ordering restitution in the amount of $50,000 because it was not linked to any specific loss suffered by the government. Furthermore, Naccarato asserts that there was insufficient proof of loss during the

lower court proceedings to support the determined restitution amount.

An order of restitution pursuant to 18 U.S.C. § 3663(b)(l)(B) may require the defendant, in a case of an offense resulting in loss of property of a victim of the offense, to pay an amount equal to the value of the property on the date of loss. The amount must be definite, supported by the evidence and limited by the amount actually lost by the victims. *United States v. Pomazi*, 851 F.2d 244, 249-50 (9th Cir. 1988); *United States v. Mischler*, 787 F.2d 240, 245 (7th Cir. 1986). The amount of loss caused by the offense may be proved in one of three ways: by proof at trial, by judicial determination, or through the consent of defendant. *United States v. Harris*, 761 F.2d 394, 404 (7th Cir. 1985) "citing *United States v. Gering*, 716 F.2d 615 (9th Cir. 1983)". The burden is on the Government to prove the amount of loss to the victim as a result of the offense by a preponderance of the evidence. 18 U.S.C. 3664(d).

As a part of his sentence, appellant is required to pay $50,000 to Tlingit within 5 years after serving the term of imprisonment imposed.

Contrary to appellant's assertion the record adequately supports the restitution amount: Tagaban awarded over $400,000 in unauthorized contract work to Naccarato's company; due to the discrepancy between the rental rate of the warehouse leased by Tlingit ($1.25 per square foot) and the fair market rental value of the property ($.65 per square foot) Tlingit was damaged in the amount of $78,500. There is also evidence showing that despite the fact that the housing authority rented the

entire warehouse others were occupying the building without Tlingit authority or permission.

Although the district court did not determine an actual amount of loss to Tlingit there is sufficient evidence proving that the housing authority suffered losses in amounts substantially exceeding $50,000.

The district court did not abuse its discretion by ordering restitution in the amount of $50,000.

AFFIRMED in all respects.

APPENDIX "B"

Sec. 18.55.995. Purpose and Intent. The legislature finds that an acute shortage of housing and related facilities exists in the villages of Alaska and that adequate housing cannot be provided by the private sector due to the economic depression that exists in most villages of Alaska. It is the purpose and intent of the legislature to provide a means for certain Native associations to form public corporations with the powers and duties comparable to the Alaska State Housing Authority. (§ 1 ch 123 SLA 1971; am § 2 ch 151 SLA 1975)

(2)

No. 90-1478

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In the Supreme Court of the United States

OCTOBER TERM, 1990

FRANK L. NACCARATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner was convicted of conspiring to bribe a public official, in violation of 18 U.S.C. 201. The question presented is whether the individual to whom the bribes were paid was a "public official" within the meaning of Section 201(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1478

FRANK L. NACCARATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-12) is not reported, but the judgment is noted at 921 F.2d 282 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1990. The petition for a writ of certiorari was filed on March 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Alaska, petitioner was convicted of con-

spiring to bribe a public official, in violation of 18 U.S.C. 201(b) and 371. He was sentenced to 18 months' imprisonment and was ordered to pay $50,000 in restitution. The court of appeals affirmed. Pet. App. 1-12.

1. The evidence at trial showed that petitioner conspired with co-defendants Myron Brinkman, Michael Orsborn, and Ken Eldridge to bribe Felipe Tagaban, the administrative officer of the Tlingit-Haida Regional Housing Authority (Tlingit), an Alaska state housing corporation.[1] Petitioner and his co-conspirators made two $10,000 payments to Tagaban in return for Tagaban's entering a lease, on behalf of Tlingit, for a warehouse the co-conspirators owned and for other favorable treatment. Pet. App. 3-4.

The Department of Housing and Urban Development dispensed some $3,500,000 to Tlingit between May 1983 and the spring of 1985 to promote renovation of low income housing in Juneau, Alaska. The funds were provided under the Comprehensive Improvement Assistance Program (CIAP), a special program conducted under the Housing Act of 1937, 42 U.S.C. 1437. Tlingit was required to obtain HUD's approval before spending any funds under the CIAP program. Pet. App. 2-3; Gov't C.A. Br. 3-4.

Tagaban was Tlingit's administrative officer and the coordinator of its participation in CIAP. Subject to the approval of a superior, Tagaban had authority to hire and fire employees, to negotiate contracts, and to locate warehouse or office space. Tagaban determined that Tlingit would need a warehouse for the supplies and equipment involved in its renovation program. Co-defendant Orsborn, an acquaintance of Tagaban, offered to help find a warehouse for Tlingit. Pet. App. 2-3; Gov't C.A. Br. 4.

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[1] Tagaban, Brinkman, and Orsborn pleaded guilty and testified on behalf of the government at petitioner's trial. Eldridge was acquitted. See Gov't C.A. Br. 10; C.A.E.R., Docket Entries 7.

In the summer of 1983, petitioner met with Orsborn and undertook to build a warehouse for Tlingit. Petitioner solicited co-defendant Brinkman's assistance in the project. Brinkman provided financing for the project, and he and petitioner selected a site on co-defendant Eldridge's land for the warehouse. Petitioner, Brinkman, and Eldridge formed a partnership, the Lemon Glacier Development Company, to complete the project. Pet. App. 3.

The partnership agreed to pay Orsborn a $25,000 finder's fee if he obtained a reliable tenant for the warehouse. Orsborn in turn told Tagaban that Tagaban would receive $10,000 if he signed a lease for the warehouse on Tlingit's behalf. Tagaban signed a lease on October 18, 1983. The lease called for Tlingit to pay $1.25 per square foot for a five-year rental term. The rental price was approximately twice the fair market rate for the warehouse space. Tagaban entered the lease on behalf of Tlingit even though he lacked authority to do so. In December of 1983, Tagaban signed a letter of intent, on behalf of Tlingit, indicating that Tlingit would lease office space at the warehouse for $1.65 per square foot. Pet. App. 3-4 & nn.1-2; Gov't C.A. Br. 6-7.

In March 1984, Tagaban contacted Orsborn and asked about the promised $10,000 payment. Orsborn told Tagaban to call petitioner. After Tagaban contacted petitioner, petitioner and Brinkman delivered $10,000 in cash to Tagaban. Pet. App. 4; Gov't C.A. Br. 7.

Petitioner, Brinkman, and Eldridge also controlled a company known as "Heavier Than Air," which performed repair and renovation work for Tlingit under the CIAP program. Heavier Than Air was paid more than $700,000 by Tlingit under that program. In September 1984, Brinkman delivered another $10,000 to Tagaban on behalf of petitioner, Brinkman, and Eldridge. Brinkman testified that he understood it to be a payment for Tagaban's continued

favorable treatment of their companies. Pet. App. 4; Gov't C.A. Br. 7-8.

In March 1985, Tlingit fired Tagaban after discovering that he had acted without authority in entering the warehouse lease with the Lemon Glacier partnership. Before he left Tlingit, however, Tagaban signed nine emergency repair contracts assigning some $500,000 in work to petitioner's company. Tagaban backdated the contracts to October 1984. Pet. App. 4 & n.3; Gov't C.A. Br. 8-9.

Prior to trial, petitioner moved to dismiss the indictment on the ground that Tagaban was not a "public official" covered by the federal bribery statute.[2] The district court denied the motion, and petitioner was convicted.

2. In an unpublished opinion, the court of appeals affirmed the conviction. Pet. App. 1-12. The court rejected petitioner's contention that Tagaban was not a "public official" within the meaning of 18 U.S.C. 201. Applying the standards outlined in *Dixson* v. *United States*, 465 U.S. 482, 486 (1984), the court of appeals noted that "[t]he determination of whether Tagaban was a 'public official' turns on the relationship between him and the Federal Government"—specifically, whether "Tagaban occupied a position of public trust with official federal responsibilities." Pet. App. 5, 6. The court found that "[b]y administering HUD funds, Tlingit subjected itself to federal constraints and restrictions"

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[2] Section 201(a)(1) defines a "public official," in pertinent part, as:

> an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government.

This provision was amended in 1986, but the amendments did not alter the substance of the definition and are not material to this case. See Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 46(a), 100 Stat. 3601.

and that "[a]s the coordinator of Tlingit's involvement with CIAP [Tagaban] had authority to negotiate contracts, and expend Federal Government funds." *Id.* at 6. Thus, the court concluded, "Tagaban's role in Tlingit is not distinguishable from the role of petitioners in *Dixson*." *Ibid.* Tagaban "was in a position of responsibility, acting on behalf of the Federal Government in administering expenditures of federal funds and implementing federal policy." *Ibid.*[3]

ARGUMENT

Petitioner contends (Pet. 6-9) that Tagaban did not qualify as a "public official" within the meaning of Section 201.

As the court of appeals found, *Dixson* v. *United States*, *supra*, forecloses that contention. In *Dixson*, the defendants were officers of a private, non-profit corporation that administered and expended block grants disbursed by HUD under a federal urban renewal program. The defendants were convicted of violating 18 U.S.C. 201(c) by soliciting kickbacks from contractors seeking to perform work on urban renewal projects. Based upon the language and legislative history of Section 201, the Court concluded that Congress did not intend to restrict the definition of "public official" to "those persons in an employment or agency relationship with the Federal Government" or to "individuals tied to the Federal Government by direct contractual obligations." 465 U.S. at 493-494. The Court explained that "[t]o determine whether any particular individual falls within this

[3] The court also held that there was sufficient evidence to sustain petitioner's conviction, that the district court did not commit plain error in declining to instruct on the offense of giving an illegal gratuity, and that the district court did not abuse its discretion in ordering petitioner to pay $50,000 in restitution. Pet. App. 7-12. Petitioner does not seek further review of those determinations.

category, the proper inquiry is not simply whether the person ha[s] signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities. Persons who hold such positions are public officials within the meaning of § 201." *Id.* at 496.

The facts of this case are strikingly similar to those of *Dixson*. Tlingit, like the non-profit corporation involved in *Dixson*, was the recipient of federal funds, intended for use in renovation projects, that were expended in accordance with detailed federal standards. See Pet. App. 2, 5-6; 465 U.S. at 486-489. Tagaban had operational responsibility—comparable to that of the defendants in *Dixson*—for Tlingit's participation in the CIAP program. See Pet. App. 2-3; 465 U.S. at 497. *Dixson* thus compels the conclusion that Tagaban was a "public official" within the meaning of Section 201. The court of appeals' straightforward application of *Dixson* to the particular facts of this case presents no question calling for this Court's review.

Contrary to petitioner's contention (Pet. 7), it is immaterial that Tlingit was not wholly dependent upon federal funds. In *United States* v. *Strissel*, 920 F.2d 1162, 1165-1166 (1990), the Fourth Circuit rejected the same contention in a case involving the CIAP program and a local housing authority indistinguishable from Tlingit. The court explained that although the defendant "also had some state responsibilities and state funding," "[h]e administered federal funds in a federal program, and the nature of his responsibilities * * * was clearly federal." *Id.* at 1165, 1166. Accord *United States* v. *Velazquez*, 847 F.2d 140, 142 (4th Cir. 1988) (a jailer employed by a county who, pursuant to a contract between the county and the federal government, supervised federal prisoners housed together with state inmates at a county jail was a "public official"). See also *United States* v. *Madeoy*, 912 F.2d 1486, 1494-1495 (D.C. Cir. 1990)

(VA-approved fee appraiser was a public official despite the fact that he was not employed by the federal government), cert. denied, 111 S. Ct. 1008 (1991).

Similarly, the fact that Tagaban lacked actual authority to enter a lease with the Lemon Glacier partnership does not undercut his status as a public official within the meaning of Section 201. See Pet. 8. As the court below found, Tagaban had substantial authority under the housing renovation program, including the authority to hire and fire employees, to negotiate contracts, and to commit Tlingit's funds, subject to the approval of its executive director. "Although Tagaban was not the ultimate authority in Tlingit, he had a substantial role in the housing authority's implementation of CIAP." Pet. App. 6. He held "a position of responsibility, acting on behalf of the Federal Government in administering expenditures of federal funds and implementing federal policy." *Ibid.* Under the standard set forth in *Dixson*, therefore, Tagaban was a "public official."[4]

Finally, like the defendants in *Dixson* (see 465 U.S. at 490), petitioner relies on *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975), and *United States* v. *Loschiavo*, 531 F.2d 659 (2d Cir. 1976). In both of those cases, the Second Circuit reversed convictions based upon kickbacks paid to a city employee who was involved in the Model Cities program, a program financed in part with federal funds. To the extent that *Del Toro* and

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[4] Petitioner also asserts (Pet. 8) that there is nothing in the record to show that Tagaban's salary was paid in whole or part from federal funds. Although the source of Tagaban's salary does not control the question whether he was a public official, see *United States* v. *Velazquez*, 847 F.2d at 142, the record reflects that federal funds were used to make up the difference between Tlingit's receipts and its expenditures. Gov't C.A. Br. 16. Thus, Tagaban was paid, at least in part, with HUD funds.

Loschiavo suggest that an individual must be employed by or report directly to the federal government in order to qualify as a "public official," they are no longer good law. As noted, *Dixson* squarely held that the federal bribery statute is not restricted to "persons in an employment or agency relationship with the Federal Government." 465 U.S. at 493-494. Since *Dixson*, moreover, the Second Circuit has indicated that *Del Toro* and *Loschiavo* turned on the fact that "the funds at issue in the case—although substantially generated by a federal agency—were administered and controlled by the city, not the federal government." *United States* v. *Romano*, 879 F.2d 1056, 1059 (2d Cir. 1989). In this case, by contrast, "HUD approval was required prior to any expenditure of funds pursuant to CIAP." Pet. App. 3. There is therefore no conflict between the court of appeals' decision in the instant case and decisions of the Second Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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